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(4)

No. 07-466

FILED
JAN 30 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term 2007

ALICIA REEVES and ASHLEE REEVES,

Petitioners,

vs.

ALEX CHURCHICH, KEVIN JONES, DAVID WIERMAN, C. HOUSLEY,

Respondents.

On Petition for Writ of Certiorari to the Tenth Circuit Court of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENTS' ASSERTIONS OF FACT

In their assertions of fact and arguments, Respondent Churchich of the Salt Lake County Sheriff's Office and Respondents Jones, Wierman, and Housley of the Salt Lake City Police Department ("Respondent SLCPD") attempt to re-characterize the facts of the case, but the facts material to the questions presented are as set forth in the Petition. *See* Petition pp. 2-7. Respondents appear to forget that on review of the motion for summary judgment asserting qualified immunity, the Court would resolve disputed facts in Petitioners' favor and would view the evidence and draw reasonable inferences therefrom in the light most favorable to the Petitioners. *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001).

Petitioners specifically correct the following inaccurate factual assertions made by Respondents:

1. Respondent SLCPD claims "that no guns were pointed at [Ashlee Reeves] while she was in her bedroom", only at her window, and argue that Petitioners have no support for their statement that "Ashlee was shocked that a man was looking into her back bedroom window". SLCPD brief p. 2, ¶¶ 2, 3. However, Ashlee testified in her affidavit,

> In the afternoon of June 21, 2000 I had just gotten out of the shower and was in my bedroom to put my clothes on.

> Just after I dropped my towel and was naked, *I looked up and through my window saw a man with a gun that I believed to be a police officer and he told me not to move.*
>
> *Because I was naked and fearing for my life*, I grabbed my towel and ran out of my room to my mother in the living room.

R 537. (emphasis added). Also, Officer Wierman who was on containment in the back of the Duplex, and was supposed to stay away from windows, reluctantly admitted approaching the windows and pointing his rifle at a "person" in Ashlee's bedroom:

> Q. Now, as you looked in those lower level, I think you called them, sublevel windows, did you observe any person?
> A. I do remember that there was some movement in the lower level unit.
> Q. Okay. Did you observe a teenage girl?
> A. What I remember was the movement. Through talking about this case I know ***that person*** has been identified as a young girl, but that I do not recall.
>
> . . . .
>
> Q. Okay. Your recollection is that you had visibility and you could see there was movement in that room.
> A. That's correct.

Q. Okay. And you would have said, "Police. Don't move."
A. Correct.
Q. *Did you point your rifle into that room?*
A. *Yes. I would have pointed my rifle at anything that was a threat.*
Q. *You believe that movement down in that room was a threat to you?*
A. *Any movement is a possible threat, correct.*

. . . .

Q. Okay. And I'm talking about the very end of your rifle –
A. Correct.
Q. – where the bullet comes out.
A. Understood, muzzle end.
Q. Okay. Where was that placed?
A. Placed?
Q. Right. Where was that placed when you pointed the rifle into the window?
A. Well, the most accurate way to describe it is pointed at the window. Just as we have this piece of glass here, ***it was pointed at something on the other side. It's pointed at the window and what's beyond.***

R 336-340. (emphasis added).

2. Respondents inaccurately assert that Respondent Churchich only momentarily pointed his rifle at Ashlee Reeves, after she moved to her mother's bedroom to try and dress. Ashlee's testimony was that

the muzzle of Churchich's rifle followed her as she moved within her mother's bedroom. R 537, 469, 474, 530. Respondent Churchich claims that this testimony is inconsistent with Ashlee's statement that the rifle was pointed at her. Churchich brief, p. 5, fn. 4. There is no inconsistency, since the rifle was both pointed at her and then followed her movement in the room. R 448, 470, 474.

3. Respondent Churchich asserts that the muzzle of his rifle may have only been even with the window ledge of the bedroom, when Ashlee Reeves testified that Churchich's rifle was clearly inside her mother's bedroom. *See* Churchich brief p. 5, R 470-71, 537.

4. Respondents dispute whether Officer Jones pointed his pistol at Alicia Reeves' head and whether Detective Churchich inserted his rifle into Alicia's bedroom. SLCPD brief p. 2, ¶ 4, Churchich brief p. 4, fn. 3. However, in addition to Petitioners' testimony establishing these facts, the record contains the following testimony of an eye-witness from across the street:

> I saw the officer in the lighter clothing go to the southwest corner of the duplex, and while he was there, *I saw him stick his rifle into the west-facing window on the southwest corner.*
>
> Later I saw the officer in the lighter clothing go to the front entrance with some of the other officers wearing blue.

> I then saw my neighbor Alicia Reeves opening the screen door to the duplex and bending down to pick up her dog. Before she came back up, *one of the officers in dark blue put his gun to Alicia's head.*
>
> After Alicia came up, I observed that she realized there was a gun to her head, and I observed her push it away.

R 530. (emphasis added).

5. Churchich states he pointed his rifle in Alicia's Reeves "direction" when he told her to go back into her residence, rather than acknowledge the testimony of Alicia Reeves and her neighbor establishing that Churchich aimed the muzzle of his rifle at Alicia Reeves. *See* Churchich brief p. 7, R 207, 210, 541. The neighbor's affidavit states,

> I heard and saw my neighbor Alicia Reeves down below, asking the officers what was going on and whether they had a warrant.
>
> I saw an officer on the landing below dressed in lighter-colored clothing, who was holding a rifle. This officer later identified himself to me as Detective Churchich.
>
> While he was on the landing below, I heard Detective Churchich tell Alicia Reeves to go back into her apartment

> and *I saw him bring his rifle up and point it at Alicia Reeves.*

R 541. (emphasis added).

6. Respondent SLCPD incorrectly argues that Petitioners record citations do not support their statement that Alicia Reeves was not allowed to leave the duplex. SLCPD brief pp. 2-3, ¶ 5. Respondent SLCPD cites only instances when Alicia left her residence, which is different than leaving the duplex. Although she wanted to get herself and her daughter out of the duplex for their protection, Respondents prevented Alicia from leaving the duplex. R 208, 212, 213, 534.

7. Respondent SLCPD claims that Alicia Reeves left her home "4-5 times" to interfere with the police action, when the record actually shows she left three times during the police action to protect her daughter from the unexplained, ongoing assaults and menacing of the officers. R 207. She left again after the police action was over. R 207-08. *See also, Reeves* 484 F.3d at 1249-50.

8. Respondent Churchich inaccurately states that Officer Jones told the SLCPD officers that the target residence was in the upstairs residence of the duplex, but his record cite shows that only one officer, Officer Bruno, was told by Jones about the target residence. Churchich's brief p. 3. Churchich admitted he did not tell any of the other officers which of the two residences was the target residence and, except for Bruno, none of them were informed of the target residence within the duplex. R 251, 321-22, 344, 388.

9. Respondents assert that they were only trying to protect the Reeves during their action, but the Record shows the contrary. R 250-51, 534. Churchich lumped Ashlee and Alicia Reeves and their home together with the suspect and the target residence, by not informing the SLCPD officers about the separate residences, and by inserting his rifle into the Reeves' home. Also, while he had someone call the Bell residence to ask for the suspect, he did not have anyone call or otherwise contact Alicia Reeves to warn her about the impending invasion, to ask her to leave, or even to tell her to protect herself within her home. R 534.

REPLY AS TO WHY THE WRIT SHOULD BE GRANTED

The Fourth Amendment does not mean much if it means police, in the name of pursuing a potentially dangerous suspect, may arbitrarily assault innocent citizens with loaded firearms while they are within the privacy and security of their own homes. Yet, under the Court's present Fourth Amendment analysis, as interpreted by lower courts, officers are permitted, without warrant or exigent circumstances, to insert loaded firearms into private homes and train them on innocent citizens. *Reeves v. Churchich*, 484 F.3d 1244, 1251-58 (10th Cir. 2007).

Citing "*Hodari D.* and its progeny", the Tenth Circuit arrived at the conclusion that officers did not violate fourteen-year-old Ashlee Reeves' Fourth Amendment rights, when they aimed their rifles at her while she was naked and trying to dress in her bedroom

and then in her mother's bedroom. *Id.* at 1251-53. The court concluded that since Ashlee chose not to remain in the line of fire, no "seizure" occurred under the Fourth Amendment. *Id.* Also, relying on several other Supreme Court opinions, the Tenth Circuit concluded that Respondent Churchich, again, acting without warrant or exigent circumstances, did not unlawfully enter the Reeves home when he inserted his rifle into Alicia Reeves' bedroom and trained it on Ashlee, since the rifle was not a sensory device that gathered information. *Id.* at 1258.

The case at bar demonstrates the need for a clearer articulation by the Court of the respective rights and duties of citizens and law enforcement under the Fourth Amendment. The court's decision, as well as the unreasonable conduct of the Respondents in the matter at bar, are properly ascribed to the line of decisions cited by the Tenth Circuit which hold assault by firearm, even in one's home, as merely an assertion of authority, requiring submission to garner Fourth Amendment protection. *Id.* at 1251-53. According to these cases, one must be stopped by the firearm (e.g. shot) before the Fourth Amendment applies. *Id.* Thus, the court concluded Ashlee's mother also was not entitled to Fourth Amendment protection after she left her home in an effort to protect her daughter from further assaults, since she indignantly pushed Officer Jones' gun away from her head and since she did not back into her home when threatened by Churchich's rifle. *Id.*

The Court's search and seizure analysis, as interpreted and applied by lower courts, is incongruous with the plain meaning of the Fourth Amendment which

guarantees "*[t]he right of the people to be secure in their persons, houses*, papers, and effects, *against unreasonable searches and seizures*". (emphasis added). It is also inconsistent with the Court's pronouncements about privacy and liberty interests within one's home:

> At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton v. New York, 445 U. S. 573, 589-90 (1980):

Respondents argue that Supreme Court review is unnecessary since the facts of the matter at bar are unlikely to occur with regularity and since the present Fourth Amendment analysis serves well a majority of the time. To the contrary, at issue is an incomplete construction of the Fourth Amendment which does not provide sound direction to law enforcement and which leaves all citizens vulnerable, even in their homes, to unreasonable and dangerous police practices. The case law fails to guarantee the "right of the people to be secure in their persons [and] houses."

Respondents also argue that the Fourth Amendment's language defies further clarification and that any new analytical framework would be more confusing than helpful to law enforcement. Petitioners strongly disagree.

The Court, for example, could determine that under *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), police assault by firearm constitutes "seizure" by physical force. In *Hodari D.*, the Court held that submission to the assertion of authority *or* physical force constitutes a seizure within the meaning of the Fourth Amendment. *Hodari D*, 499 U.S. at 626 . Regarding seizure by physical force, the Court quoted from Cornelius, *Search and Seizure*, as follows,

> "There can be constructive detention, which will constitute an arrest, although the party is never actually brought within the physical control of the party making an arrest. This is accomplished by merely touching, however, slightly, the body of the accused, by the party making the arrest and for that purpose, although he does not succeed in stopping or holding him even for an instant; as where the bailiff had tried to arrest one who fought him off by a fork, the court said, 'If the bailiff had touched him, that had been an arrest. . . .'" A. Cornelius, *Search and Seizure* 163-164 (2d ed. 1930) (footnote omitted).

Hodari D., 499 U.S. at 625.

While the Tenth Circuit and other courts have viewed the aiming of a firearm as a mere show of authority, use of a firearm can and should be considered seizure by physical force. Since it communicates the promise of imminent death, assault by firearm is more physically forceful than touching. Such an assault is, usually, highly traumatizing, and leaves the targeted individual feeling at least as violated as having been touched by police. Furthermore, in the case at bar and in nearly all cases, officers show authority independent of aiming a firearm, such as by a command not to move. Pointing of a firearm *is* physical force more than it is a show of authority. Finally, holding that assault by firearm constitutes "seizure" would be consistent with safe police practice. Law enforcement experts believe that officers should only aim firearms when willing to kill. R 510.

Regarding the issue of unlawful entry, the Court could simply hold that extension of an officer's person (including through a firearm) into the "unambiguous physical dimensions of an individual's home" does constitute unlawful entry within the meaning of the Fourth Amendment. *See, Silverman v. United States*, 365 U.S. 505, 511 (1961).

Alternatively, the Court could define "seizure" in terms of the conduct of officers rather than in terms of the response of citizens, and then separately analyze violation of citizens' Fourth Amendment rights. As noted above, present Fourth Amendment jurisprudence defines proper police conduct in terms of citizen response to that conduct. Pointing or even discharging a loaded firearm at a citizen may or may not be proper, depending on whether that conduct brings the citizen to

a halt. Likewise, officers may insert loaded firearms into private homes, so long as the firearm does not keep a resident from moving.

Justice Stevens, dissenting in *Hodari D.*, expressed the following concerns about defining proper police conduct in terms of citizen response:

> In my view, our interests in effective law enforcement and in personal liberty would be better served by adhering to a standard that "allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." *Chesternut*, 486 U.S. at 574. The range of possible responses to a police show of force, and the multitude of problems that may arise in determining whether, and at which moment, there has been "submission," can only create uncertainty and generate litigation.
>
> . . . .
>
> "The court today defines a seizure as commencing, not with egregious police conduct, but rather with submission by the citizen. Thus, it both delays the point at which "the Fourth Amendment becomes relevant" to an encounter and limits the range of encounters that will come under the heading of "seizure." Today's qualification of the Fourth Amendment means that innocent citizens may remain "secure in their

> persons . . . against unreasonable searches and seizures" only at the discretion of the police. (footnotes omitted).

Hodari D. 499 U.S. at 643-44, 647.

A two-part examination which considers "seizure" in relation to officer conduct and irrespective of citizen response would inform officers about the legality of their conduct before acting, and would protect citizen liberty and privacy from unreasonable and dangerous law enforcement practices. Such an analysis would also be true to the phrasing of the Fourth Amendment, which uses the word "seizure", not in relation to the "right of the people", but instead in reference to prohibited governmental conduct. The "right of the people" in the Fourth Amendment is to be "secure" in their persons and houses, "against" prohibited governmental conduct in the form of "unreasonable searches and seizures".

Applying such a two-part examination to the matter at bar, the Court could conclude, (1) Respondents, acting without warrant or exigent circumstances, engaged in unreasonable search and/or seizure by directing loaded firearms into the home of and at Petitioners and (2) Petitioners right to security in their home and persons was violated because the threshold of the home was crossed, their privacy invaded, and their liberty restricted.

In any event, Petitioners are confident that the Court can refine Fourth Amendment analysis in a way

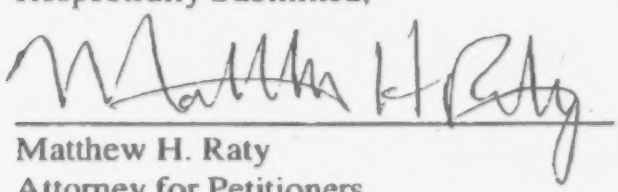
to give meaning to Fourth Amendment rights in all cases.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari since, as evidenced by the case at bar and the cases cited by the Tenth Circuit in *Reeves*, present Fourth Amendment construction does not adequately protect citizen rights to liberty and privacy in their houses and persons, and does not provide sound direction to law enforcement on their corresponding Fourth Amendment duties. Refinement of Fourth Amendment analysis by the Court will provide the appropriate direction needed to law enforcement and protect the liberty and privacy guaranteed to all citizens.

WHEREFORE, Petitioners respectfully request that the Court grant their Petition for Writ of Certiorari.

Respectfully Submitted,



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